

No F.O.

BEFORE THE MONTANA DEPARTMENT
OF
NATURAL RESOURCES AND CONSERVATION

FILMED

APR 5 1990

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.)
1681-s43Q, BY UNITED STATES)
DEPARTMENT OF INTERIOR, BUREAU)
OF LAND MANAGEMENT)

PROPOSAL FOR DECISION

Pursuant to the Montana Water Use Act, Section 89-865, et seq., R.C.M. 1947, and after due notice, a hearing was held on September 26, 1974, in Billings, Montana, for the purpose of hearing objections to the above-named Application.

The objector, M. E. Eddelman, Worden, Montana, appeared and presented statements and testimony. The Applicant, Bureau of Land Management, was represented by Counsel, Tom Gai, associated with the Field Solicitors Office. Mr. Thomas J. Brown, a Civil Engineer Technician with the Bureau of Land Management, appeared and presented testimony. Mr. C. Rex Cleary, District Manager of the Billings Bureau of Land Management office, appeared and presented testimony. Mr. Kelly Hammond, a natural resource specialist with the Bureau of Land Management office in Billings also appeared and presented testimony. The Applicant entered into evidence 8 exhibits consisting of maps, books and charts.

On October 2, 1974, the Applicant sent to the Department of Natural Resources and Conservation (hereinafter called "Department") a brief detailing some of the arguments raised at the hearing. That brief is now part of the application file.

PROPOSED FINDINGS OF FACT

1. On March 5, 1974, at 1:04 p.m., C. Rex Cleary of Billings, Montana, filed with the Department an Application for Beneficial Water Use Permit for a reservoir located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 8, Township 4 N, Range 31E in Yellowstone County, Montana. The reservoir is located in an unnamed tributary of Hibbard Creek and it will contain 1.5 acre feet of water. The reservoir was completed in November of 1973.

CASE # 1681

2. On July 2, 1974, Mr. M. E. Eddelman of Worden, Montana, filed a timely objection to the Application requesting that it not be granted because it deprived his prior existing reservoir of one of its main sources of water, depriving his livestock of needed water, thereby unreasonably adversely affecting his prior existing right.

3. Testimony at the hearing established Mr. Eddelman's date of appropriation as prior to 1965.

4. Testimony at the hearing established that the only waters available to both the Applicant's and the Objector's reservoirs are spring runoff waters from melting snow and rains.

5. Testimony at the hearing indicated that the Objector's reservoir has been filled to its full capacity of 7 acre-feet only twice in the last ten years, and then only negligible quantities of water overflowed the spillway. Mr. Eddelman's reservoir is now dry.

6. Testimony indicated that the total drainage area available to the Objector's reservoir was between 300 and 350 acres producing from 5 to 6 acre-feet of average annual runoff.

7. Testimony indicated that the rate of evaporation from the Eddelman reservoir is 50% per year, but it is common knowledge that the most evaporation in this area occurs in June, July and August.

8. Testimony indicated that the Objector's average annual beneficial use of his reservoir has been probably from 1 to 4 A.F. or (acre-feet), depending upon the amount of water collected. The high water mark in the reservoir is at the 4 A.F. or (acre-feet) level.

9. Testimony indicated that the grass growing in Section 9 is sufficient feed for the number of cattle which would consume one acre foot of water per grazing season.

10. Testimony indicated that there are cattle in the adjoining section of Eddelman's land and that cattle will walk five miles to water.

CASE # 1681

11. Testimony at the hearing indicated that the BLM reservoir would deprive Mr. Edelman's reservoir of over 1/3 of its total drainage area and therefore over 1/3 of its total water supply. The BLM reservoir is also now dry.

PROPOSED CONCLUSIONS OF LAW

1. The BLM reservoir constitutes an unreasonable adverse effect on Mr. Edelman's prior existing reservoir, except in those unusual years when the drainage area produces more water than is required to fill Edelman's reservoir to 4 A.F. or (acre-feet).

2. The Montana Water Use Act of 1973 has nullified the diffuse surface water doctrine in water law. Any diffuse surface water not appropriated prior to July 1, 1973, cannot be appropriated without applying for a beneficial water use permit from the Department. From the plain meaning of the language used in the statute, diffused surface water is subject to appropriation and must be appropriated by applying for a permit from the Department. Therefore the Applicant by not applying for and receiving a permit has not established a date of appropriation prior to the Objector's.

3. The Bureau of Land Management has no reserved water right in this property. There is no language in the patent introduced into evidence by the Applicant to indicate that the United States intended to reserve the water in itself. Bureau of Land Management property has not been withdrawn from the public domain, it is subject to sale in the future and therefore is not included in the lands for which water has been reserved for future uses by the "reservation doctrine" as first established in Winters v. United States, 207 U. S. 564.

PROPOSED ORDER

It is hereby ordered that:

1. Application for Beneficial Water Use Permit No. 1681-s43Q be granted subject to Mr. Edelman's apparent prior existing right of 4 acre feet as indicated by the reservoirs high water mark.

CASE # 1681

2. The Applicant install a pipe with valve of not less than 12" diameter in the bottom of the dam so that the reservoir will not retain any water until Mr. Eddelman's reservoir fills to the high water mark and contains 4 acre feet of water.

3. This permit is subject to all other prior existing water rights, if any.

NOTICE: This is a proposed order and will become final when accepted by the Administrator, Division of Water Resources, Department of Natural Resources and Conservation, pursuant to Section 82-4212, R.C.M. 1947, and Rule MAC 1-1.6(2)-P6190. Written exceptions to this proposed order shall be filed with the Administrator within five (5) days of service of this proposed order upon the parties herein. Upon receipt of any written exceptions, opportunity will be afforded to file briefs and make oral arguments before the Administrator.

Dated this 11th day of August, 1974.

James Lewis
Hearing Examiner

CASE # 1681